

- (1) Did the Administrative Law Judge exceed her jurisdiction by ordering both treatment with a specific doctor and temporary total disability compensation after claimant failed to return to the authorized treating doctor for follow up care and where claimant had been returned to work by two authorized treating doctors?
- (2) Did the Administrative Law Judge exceed her jurisdiction by ordering medical treatment with a doctor of claimant's choice without first finding that the medical treatment provided was not satisfactory and without allowing respondent to provide a list of three doctors from which claimant would choose a treating physician pursuant to K.S.A. 1997 Supp. 44-510(c)?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

Claimant suffered accidental injury on June 4, 1998, when he fell from a scaffold. Claimant was taken to the emergency room at Wesley Medical Center for treatment. At that time, the medical history noted claimant fell approximately 20 feet, landing on his chest and right hip. Claimant denied hitting his head and denied losing consciousness.

Claimant was later referred to Dr. Antonio Osio, a bilingual doctor of claimant's choice. Dr. Osio saw claimant on June 16, 1998, and returned him to work after an examination, without restriction, on June 18, 1998. Dr. Osio also referred claimant to Dr. Leon Lapointe, a neurologist, for follow up.

Dr. Lapointe examined claimant on July 7, 1998. At that time, claimant provided a history to the doctor of falling and striking his head, and being unconscious for approximately 30 minutes. Dr. Lapointe performed a neurological examination which was basically normal. Dr. Lapointe did, however, recommend a follow up CT scan, and did place claimant on 50 milligrams of Midrin, with a follow up examination to be scheduled in approximately one month. Claimant never returned to Dr. Osio or Dr. Lapointe. Claimant testified that he attempted to return to Dr. Lapointe and contacted his office about the follow up care, but no follow up examination or CT Scan was ever scheduled.

On August 6, 1998, claimant went to the office of Dr. Pedro Murati for an independent medical examination. Dr. Murati was advised that claimant fell approximately 25 feet, striking his head, and as a result claimant was unconscious for approximately one hour. Dr. Murati examined claimant and diagnosed a cervical strain, lumbosacral strain, right sacroiliac joint inflammation, and post-concussion syndrome. He recommended claimant be off work temporarily and recommended treatment for claimant's headaches, physical therapy, an injection in the right sacroiliac joint, and medication for the pain and headaches.

Claimant testified at the preliminary hearing on December 3, 1998. At that time, claimant described a fall from a scaffold of approximately 25 feet, during which claimant struck his back and head, and was rendered unconscious for a significant period of time. Claimant alleges he remembers nothing after the fall until he was at the hospital.

Claimant requested additional medical treatment from respondent, and was authorized to return either to Dr. Osio or Dr. Lapointe. Claimant testified at preliminary hearing that his attempts to schedule an appointment with Dr. Lapointe were unsuccessful.

K.S.A. 1997 Supp. 44-510(c)(1) states:

If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers that are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this subsection (c)(1), either party or both parties may request the director to select a treating health care provider.

In this instance, while claimant does not specifically state dissatisfaction with the treatment of the authorized doctors, claimant does infer some dissatisfaction with his inability to schedule the CT scan as was recommended by Dr. Lapointe.

Respondent contends the statute obligates the administrative law judge to allow respondent to provide a list of three physicians from which the claimant can then choose the authorized treating physician. The Appeals Board acknowledges the language of the statute appears to obligate the administrative law judge to follow that scenario. However, the Appeals Board is limited in its ability to consider the actions of an administrative law judge when the appeal is from a preliminary hearing order.

K.S.A. 1997 Supp. 44-551(b)(2)(A) allows for appeals from preliminary awards under K.S.A. 1997 Supp. 44-534a, and amendments thereto, if it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at preliminary hearing. K.S.A. 1997 Supp. 44-534a limits the right of the parties to appeal from preliminary hearings by providing specific jurisdictional issues, including whether the claimant suffered an accidental injury, whether the accidental injury arose out of and in the course of employment, whether notice was given or claim timely made, or whether certain defenses apply.

It does not appear any of the specific jurisdictional issues contained in K.S.A. 1997 Supp. 44-534a are in dispute in this matter. Therefore, in order for the Appeals Board to have jurisdiction over this matter, the Administrative Law Judge must have exceeded her jurisdiction under K.S.A. 1997 Supp. 44-551 in ordering the relief requested.

The Appeals Board has in the past considered whether the administrative law judge's failure to allow a respondent to provide a list of three authorized doctors constitutes a violation of his or her jurisdiction sufficient to allow Appeals Board review. The Appeals Board has held that the administrative law judge is authorized to decide issues dealing

specifically with medical treatment under K.S.A. 1997 Supp. 44-534a. While an administrative law judge's failure to allow the respondent to provide the list of three doctors does appear inappropriate, it is at times within an administrative law judge's jurisdiction to make decisions at preliminary hearings dealing with the ongoing medical care received by claimants. See Cook v. TCI, Docket No. 183,789 (March 1994). However, see also Chilargi v. W. H. Braums, Inc., Docket No. 198,309 (June 1996). The Appeals Board, therefore, finds the Administrative Law Judge did not exceed her jurisdiction in appointing Dr. Murati as the authorized treating physician or in ordering temporary total disability compensation at the time of the preliminary hearing. The Appeals Board, therefore, finds that the appeal by the respondent should be dismissed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated December 4, 1998, remains in full force and effect, and the appeal of the respondent in this matter is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1999.

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BOARD MEMBER

c: Thomas T. Inkelaar, Wichita, KS  
James A. Cline, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director